AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers

Herbert Brownell, Jr., "Authority of Congressional Committees to Disapprove Action of Executive Branch" (1957)[1]

Late in Dwight Eisenhower's administration, the White House asked Attorney General Herbert Brownell for an opinion on the constitutionality of a legislative provision that had been adopted at the beginning of his presidency. The provision in question required that the relevant cabinet officials "come into agreement" with the Committee on Armed Services before any real estate over the value of $25,000 could be bought or leased.

Brownell concluded that the provision was an unconstitutional infringement on the separation of powers. The issue had arisen with other bills that Congress considered during the Eisenhower administration, and the Department of Justice had advocated that all such provisions be repealed from existing statutes and dropped from proposed bills. Brownell likewise urged that this provision of the military base construction statute be repealed. The Military Construction Act of 1960 repealed the offending provision, requiring only that the relevant officials report pending real estate transactions of more than $50,000 to Congress. The modern form of the statute imposes a "notice-and-wait" requirement on such transactions, forcing the military to wait a few weeks after the report to Congress before the transaction can be completed. Congress can, presumably, take advantage of this waiting period to make its wishes known informally to the executive branch.

This is one form of a legislative veto that became common in a wide variety of congressional statutes. What are the attorney general's objections to the legislative veto? Would any form of legislative veto meet his objections? If the president was willing to sign a bill that included such a veto, should that settle the constitutional question? Does a notice-and-wait requirement satisfy Brownell's constitutional objections? Could the executive branch refuse to comply with the legislative veto requirement by buying property with available funds despite a committee veto?

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Legislative proposals and enactments in recent years have reflected a growing trend whereby authority is sought to be vested in congressional committees to approve or disapprove actions of the executive branch. Of the several legislative devices employed, that which subjects executive department action to the prior approval or disapproval of congressional committees may well be the most inimical to responsible government. It not only permits organs of the legislative branch to take binding actions having the effect of law without opportunity for the President to participate in the legislative process, but it also permits mere handfuls of members to speak for a Congress which is given no opportunity to participate as a whole. An arrangement of this kind tends to undermine the President's position as the responsible Chief Executive.

Action by several prior Presidents on matters of this kind has been somewhat inconsistent. In 1920, President Wilson disapproved an appropriations bill which provided that the printing of magazines by executive agencies must have the prior approval of the Joint Congressional Committee on Printing. . . .

During the past dozen years or so, provisions for control by congressional committees have related, in large part, to real estate transactions of the armed forces. . . . During the House debate on [a 1943 bill], a letter was read from the Secretary of the Navy wherein that official stated: "I understand further that the committee understands from the wording of the amendment that the Department will come into agreement with the Naval Affairs Committee . . . with respect to acquisitions before final commitments are made. This procedure is acceptable to me." . . .

[1] Excerpt taken from 41 Op. Att'y Gen. 300 (1957).

This was interpreted in practice as giving to the committees a veto power over such transactions.

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During the [83rd] Congress, the Senate Committee on Public Works reported a bill which provided that no agreements for the acquisition of title to real property . . . by the Administration of General Services and the Postmaster General should be executed until the Administrator or Postmaster General had come into agreement with the Committee on Public Works. . . . During the Senate debate on the bill, a departmental memorandum of law was inserted in the Congressional Record in which the position was taken that such a provision would vest executive functions in congressional committees and, thereby, would violate the separation of powers principle of the Constitution. The Senate, however, overwhelmingly refused, by a vote of 60 to 8, to delete the provision.

. . . . On May, 25, 1954, you disapproved [that] bill on the constitutional grounds indicated above. Apparently in deference to that disapproval, the Conference Committee revised [the bill] so as to eliminate the come-into-agreement provision.

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[In regard to a Defense Department appropriations bill in 1956], the Attorney General . . . advised . . . that [the legislative veto] was, in his view, separable from the remainder of the act, and as it did not bear upon its substance as a whole, disapproval of the act was not deemed necessary. Instead, it was suggested that the offending section was not be regarded as a legally binding limitation which the Congress could constitutionally impose. In your [signing] statement of July 13, 1955, to the Congress, you advised that [the section] would be "regarded as invalid by the executive branch of the Government in the administration of [the statute], unless otherwise determined by a court of competent jurisdiction."

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A year ago, on August 6, 1956, you issued a statement voicing objection to certain provisions of a bill calling for committee approval or disapproval in terms somewhat different from the "come into agreement" provision, but of like purpose and effect. . . . In approving the bill, you stated:

"I have approved this bill only because Congress is not in session to receive and act upon a veto message and because I have been assured that the committee which handled the bill in the Congress will take action to correct its deficiencies early in the next session. . . .

"This language would thus require, before a project negotiated under the Act is allowed finality, a further act by the legislature. The action required can be viewed as either a legislative act or an executive act. However construed, constitutional defects are inherent. Viewed as requiring further legislative act, the section is open to the objection that it involves an unlawful delegation by the Congress to its committees of a legislative function which the Constitution contemplates the Congress itself, as an entity, should exercise.

"If the further act is considered not legislative in nature, then there is involved what appears to be an unconstitutional infringement of the separation of powers prescribed in Articles I and II of the Constitution. I do not believe that the Congress can validly delegate to one of its committees the power to prevent executive actions taken pursuant to law. To do so in this case would be to divide the responsibility for administering the program between the Secretary of the Interior and the designated committees. Such a procedure would be a clear violation of the separation of powers with the Government and would destroy the lines of responsibility which the Constitution provides.

"Furthermore, the negotiation and executive of a contract is a purely executive function. Although the Congress may prescribe the standards and conditions under which executive officials may enter into contracts, it may not lodge in its committees or members the power to make such contracts. . . ."

The statement concluded with the observation that the Secretary of Interior will prepare to take action as soon as appropriations are made to implement the bill and [the section] "has been removed or revised."

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It thus appears that you have consistently opposed an invasion of executive office functions and powers through legislative devices of the character indicated. Your position in such regard is, I believe, fully supported by sound constitutional doctrine.

I am of the opinion that [this provision] reflects the exercise of legislative authority not warranted by the Constitution and that it is, therefore, unconstitutional.

You have also asked for advice as to the appropriate course of action which might be taken in the event that the indicated provisions are viewed as unconstitutional. I believe the most effective and practical course of action would be to urge the repeal by the Congress of [the section]. . . .